REPORTER'S RECORD (Excerpt)
VOLUME 12A OF __
CAUSE NO. CC-01-01169-A

CAROLYN ROLLINS, Individually, and as Personal Representative of the Heirs and Estate of JUDITH KORANDA, Deceased, and JAMES KORANDA, Individually, and as Personal Representative of the Heirs and Estate of JUDITH KORANDA, Deceased,	)	IN THE COUNTY COURT
Plaintiffs,	)	AT LAW NO. 1
V.	)	
ACandS, INC., Sued Individually and as successor-in-interest to ARMSTRONG CONTRACTING & SUPPLY, INC., et al,	)	
Defendants.	)	DALLAS COUNTY, TEXAS

TRIAL ON THE MERITS

On the 25th day of March, 2003, the following proceedings came on to be heard within the presence of the jury in the above-entitled and -numbered cause before the Honorable RUSSELL RODEN, Judge presiding, held in Dallas, Dallas County, Texas.

Proceedings reported by computerized stenotype machine. Reporter's Record produced by computer aided transcription.

APPEARANCES:

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MR. B. SCOTT KRUKA
SBN 11742450
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- AND -

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- AND -

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PROCEEDINGS

March 25, 2003

COURT'S RULING ON MOTION FOR DIRECTED VERDICT

THE COURT: Okay. On the motion for directed verdict, in looking at the materials it appears to me that there are several of these doctrines that may come into play. I found instructive the materials on one of the issues I had asked about, which was the distinctions as the parties saw it between some of these.

And -- for instance, the learned intermediary doctrine, the significant difference seems to be you've got somebody who's trained to avoid the risk and, therefore, can reasonably be relied upon to take appropriate precautions. The bulk supplier is a situation where someone deals only with commercial buyers whose knowledge is equal to that of the seller, and there's little or no way to communicate any warnings to the ultimate consumers.

And then the sophisticated intermediary-user doctrine appears to be more of a situation where, although similar to the learned intermediary, it's not where you have the -- for instance, the physician/patient relationship that

requires a transfer of the information. You don't have someone who is clearly designated as specifically trained to avoid the risks that might be applicable.

But under the sophisticated intermediary, it's somebody who is experienced in the use of the product, is thoroughly aware of the risks and protective measures to avoid the risks. And, generally, the manufacturer may reasonably rely on the sophisticated user to warn employees or users of the risk and to either take precautionary measures on behalf of the employer to warn the ultimate user.

The plaintiffs refer me to Humble Sand & Gravel, which I do not find to be really controlling in this one. That one is clearly a sophisticated-user situation. In that case, the product, the sand, was being provided to the ultimate user. And in its own container, the employee who was using the product was cracking open the bag himself. And there was an inadequate warning, apparently, in that case and -- admittedly, inadequate warning in that case where the ultimate end user, which in that case was the employee of the supposed sophisticated user, was being given the product. It doesn't appear that that product was being incorporated into anything else. It was the product.

And, in fact, Humble goes to great lengths

to distinguish bulk-supplier cases. It says those are distinguishable because in those cases you don't have the ability to put warning on to the ultimate user. And so, as a result, I find that to be distinguishable from this case.

And, interestingly, the Humble case goes on and adopts a mixed-duty, restatement approach where, in that Court's opinion, the trial court needs to -- or the Court -- I assume they're talking about the trial court -- needs to first determine the duty as a matter of law.

And then the adequacy of the warning, which was referenced earlier, there was -- in the argument there was an argument that this is a question of fact. The law is clear this is a question of fact. Well, the case cited by the plaintiff does support their position to the extent that the adequacy of the warning is a question of fact. They clearly say the duty is a matter of law for the Court to determine on its own.

And the Court is to weigh the risk involved, the foreseeability, the likelihood of injury, weigh it against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendant; which, in bulk-supplier cases,

Generally, that factor has weighed greatly in saying there's not a duty to ultimately warn the ultimate consumer.

Then I looked at Cimino and its analysis of Restatement Third. And they determined that, first of all, a raw material cannot be defectively designed. And I think that was conceded yesterday that this is not a design case. And they even point out that it's not defective design. They even allude to whether there's a manufacturing defect.

But in that case they found that the asbestos was no different from any of the other forms of asbestos that were at issue; and so, therefore, there was no defect in that regard because it didn't depart from the intended design. And so applying the Restatement Third, they come to the conclusion in that case that there is not a defect in the design nor in the warning or in the duty to warn.

However, the Court there relied on certain -- certain findings or lack of findings at that stage in the process. And most importantly, the Court reiterated there was no finding of failure to warn but also that the buyer who was integrating the product was not ignorant of the risks and did not lack expertise. And they distinguished that -- they distinguished the

Alm versus Alcoa case based on that as well.

And they pointed out a caveat that "Courts have not yet confronted the question of whether, in combination, factors such as the component purchaser's lack of expertise and ignorance of the risks of integrating the component into the purchaser's product, and the component supplier's knowledge of both the relevant risks and the purchaser's ignorance thereof, give rise to a duty on the part of the component supplier to warn of risks attending integration of the component into the purchaser's product."

As a result, I don't think at this stage a directed verdict is appropriate. So we will proceed.

off the record.

(Recess taken)

THE COURT: All right. Bring them in.

THE BAILIFF: All rise for the jury.

(Jury enters the courtroom)

THE COURT: Please be seated.

All right. Mr. Elliston, you may proceed. Call your first witness.

MR. ELLISTON: Your Honor, at this time Union Carbide would call Mr. John Walsh to the witness stand.

THE COURT: All right. Mr. Walsh, please

CAUSE NO. CC-01-01169-A

CAROLYN ROLLINS, Individually and as Personal Representative of the Heirs and Estate of **JUDITH KORANDA**, Deceased, and **JAMES KORANDA**, Individually and as Personal Representative of the Heirs and Estate of **JUDITH KORANDA**, Deceased, et al *Plaintiffs*,	§	IN THE COUNTY COURT
	§	AT LAW NO. 1
vs. **ACandS, INC.** et al. *Defendants*	§	DALLAS COUNTY, TEXAS

ORDER DENYING DEFENDANT UNION CARBIDE CORPORATION'S MOTION TO EXCLUDE CAUSATION TESTIMONY

CAME ON FOR hearing the Motion of Defendant Union Carbide Corporation to Exclude Plaintiff's general and specific causation evidence that Calidria causes mesothelioma pursuant to *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 7065, 714 (Tex. 1996) and *DuPont v. Robinson*, 923 S.W.2d 549 (Tex. 1995), and after considering the pleadings, the evidence, and the arguments of counsel, the Court finds that the motion should be, and hereby is, DENIED.

Signed on the 17th day of March, 2003.

JUDGE RUSSELL RODEN

[redacted]

CAUSE NO. 348 191148 02

JOHN KATZLER, et al;	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	TARRANT COUNTY, TEXAS
BONDEX INTERNATIONAL, INC., et al.	§	
Defendants	§	348th JUDICIAL DISTRICT

ORDER DENYING DEFENDANT UNION CARBIDE CORPORATION'S MOTION FOR SUMMARY JUDGMENT AS TO KATZLER PLAINTIFFS

On the 11th of June, 2003, the Court considered Union Carbide Corporation's No-Evidence Motion for Summary Judgment as to Katzler Plaintiffs. After considering the pleadings, motion, the response, affidavits, and other evidence on file, the court:

DENIES Defendant Union Carbide Corporation's Motion for Summary Judgment as to Katzler Plaintiffs.

SIGNED on this June 11, 2003

PRESIDING JUDGE

CAUSE NO. 348 191148 02

JOHN KATZLER, et al;	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	TARRANT COUNTY, TEXAS
BONDEX INTERNATIONAL, INC., et al.	§	
Defendants	§	348th JUDICIAL DISTRICT

ORDER DENYING DEFENDANT UNION CARBIDE CORPORATION'S MOTION FOR SUMMARY JUDGMENT AS TO MELTON PLAINTIFFS

On the 11th of June, 2003, the Court considered Union Carbide Corporation's No-Evidence Motion for Summary Judgment as to Melton Plaintiffs. After considering the pleadings, the motion, the response, affidavits, and other evidence on file, the court:

DENIES Defendant Union Carbide Corporation's Motion for Summary Judgment as to Melton Plaintiffs.

SIGNED on this June 11, 2003

PRESIDING JUDGE

CAUSE NO. 00962

RODNEY STEENBERGEN and LINDA STEENBERGEN *Plaintiff*	§	IN THE DISTRICT COURT
v.	§	71st JUDICIAL DISTRICT
ACandS, INC., et al; *Defendants*	§	HARRISON COUNTY, TEXAS

ORDER

CAME ON FOR CONSIDERATION, on this 6th day of September, 2001, Garlock Inc's Motion for Summary Judgment Based on the Inability of Chrysotile Asbestos to Cause Mesothelioma.

The Court having considered the extensive briefs and all evidence filed by the parties, having heard oral argument, and having carefully considered the decisions of the Texas Supreme Court in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) and *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), determines that the relief sought by Defendants is not meritorious and **DENIES** Garlock Inc's motion in all respects

Signed on this 10th day of September 2001.

The Hon. Bonnie Leggat

CAUSE NO. 00-07604

HENRY PLUMMER and EULA PLUMMER *Plaintiffs*	§	IN THE JUDICIAL DISTRICT
V.	§	DALLAS COUNTY, TEXAS
ACandS, INC.; et. al. *Defendants*	§	160th JUDICIAL DISTRICT

ORDER Denny M/ Strike

CAME ON FOR CONSIDERATION on this the 9th day of August, 2001, the Motion of Defendant Garlock, Inc. to Strike Expert Testimony or Other Evidence that Workplace Exposure to Chrysotile Asbestos Causes Mesothelioma.

The Court having considered the extensive briefs and evidence filed by the parties, having heard oral argument, and having carefully considered the decision of the Texas Supreme Court in the cases of E. I. du Pont de Nemours & Co. v. Robinson, 923 S.W. 2d 549 (Tex. 1995) and Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W. 2d 706 (Tex. 1997) and having determined that the relief sought by Defendants is not meritorious.

It is ORDERED and DECREED that Defendant's Motion is hereby DENIED in all respects.

SO ORDERED this 9th day of August, 2001.

Signed 8/27/01

JUDGE DAVID GOLDEY

B/N: 21309

CAUSE NO. 08271-I

JOSEPH BREAUX and DIANE BREAUX *Plaintiffs*	§	IN THE DISTRICT COURT OF
	§	DALLAS COUNTY, TEXAS
VS.	§	
ACandS, Inc. *Defendants*	§	162ND JUDICIAL DISTICT

ORDER

CAME ON FOR CONSIDERATION on this the 25th day of July, 2001, the Motion of Defendants Garlock, Inc., Kelly Moore Paint Company, and North American Refractories Company to strike the testimony of Dr. Victor Roggli and exclude all testimony that chrysotile exposures can cause mesothelioma. and evidence

The Court having considered the extensive briefs filed by the parties, having heard oral argument, and having carefully considered the decisions of the Texas Supreme Court in the cases of E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W. 2d 549 (Tex. 1995) and Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W. 2d 706 (Tex. 1997), and having determined that the relief sought by Defendants is not meritorious,

It is ORDERED and DECREED that Defendants' Motions are hereby DENIED in all respects.

SO ORDERED this 25th day of July, 2001.

JUDGE PRESIDING

CAUSE NO. 14293-RM00

ELMER ROYER and HENRIETTA ROYER, et al *Plaintiffs*	§	IN THE DISTRICT COURT
	§	
	§	BRAZORIA COUNTY,
V.	§	
ACandS, INC., et al *Defendants*	§	149TH JUDICIAL DISTRICT

ORDER DENYING DEFENDANTS' OBJECTION TO AND MOTION TO STRIKE EXPERT TESTIMONY OR OTHER EVIDENCE THAT WORKPLACE EXPOSURE TO CHRYSOTILE ASBETSOS CAUSES MESOTHELIOMA

After considering Defendant's objection to and motion to strike expert testimony or other evidence that workplace exposure to chrysotile asbestos causes mesothelioma, the response, the pleadings, all evidence on file and arguments of counsel, the court DENIES Defendant's motion.

SO ORDERED this 11th day of June, 2002.

JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:

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State Bar No. 24032191
PETER A. KRAUS
State Bar No. 11712980
3219 McKinney Ave., Ste. 3000
Dallas, Texas 75204
(214) 357-6244
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IN THE DISTRICT COURT OF KLEBERG COUNTY, TEXAS THE 105TH JUDICIAL DISTRICT OF TEXAS

LOUIS BARLETTA AND JANE BARLETTA
VS. **NO. 01-0454-D**
AMERICAN CYANAMID, *ET AL.*

ORDER OVERRULING OBJECTION AND DENYING MOTION BY DEFENDANT GARLOCK CONCERNING EVIDENCE OF CHRYSOTILE ASBESTOS

On October 3, 2002 the Court heard the "Objection to and Motion to Strike Expert Testimony or Other Evidence that Workplace Exposure to Chrysotile Asbestos Causes Mesothelioma" filed by Defendant GARLOCK SEALING TECHNOLOGIES, LLC. Defendant GARLOCK appeared by counsel. Plaintiffs appeared by counsel. Counsel for other Defendants also appeared. Documentary evidence and written and oral rgument were presented. The Court deferred its rulings pending further study and review of the matter. Having done so, the Court is of the opinion that the objection should be overruled and the motion denied.

IT IS THEREFORE ORDERED that Defendant GARLOCK's objection to proposed evidence that Chrysotile Asbestos causes Mesothelioma be and is hereby **OVERRULED**, and that its motion to strike expert testimony or other evidence that workplace exposure to Chrysotile Asbestos causes Mesothelioma be and is hereby **DENIED**.

The Clerk of this Court shall send a certified copy of this Order to the parties.

Signed October 16, 2002

J. MANUEL BAÑALES
JUDGE PRESIDING

CAUSE NO. CC-01-01169-A

CAROLYN ROLLINS, Individually and as Personal Representative of the Heirs and Estate of **JUDITH KORANDA**, Deceased, and **JAMES KORANDA**, Individually and as Personal Representative of the Heirs and Estate of **JUDITH KORANDA**, Deceased, et al	§	IN THE COUNTY COURT
Plaintiffs,	§	AT LAW NO. 1
vs.	§	
ACandS, INC. et al.	§	
Defendants	§	DALLAS COUNTY, TEXAS

ORDER DENYING DEFENDANTS' MOTION TO EXCLUDE CAUSATION TESTIMONY

CAME ON FOR hearing the Motion of Defendants Kelly-Moore Paint Company and Flintkote Company to Exclude Plaintiff's general and specific causation evidence that chyrsotile causes mesothelioma pursuant to *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 7065, 714 (Tex. 1996) and *DuPont v. Robinson*, 923 S.W.2d 549 (Tex. 1995), and after considering the pleadings, the evidence, and the arguments of counsel, the Court finds that the motion should be, and hereby is, DENIED.

Signed on the 17th day of March, 2003.

JUDGE RUSSELL RODEN

CAUSE NO. 26658

JAMES LANSFORD and LETA LANSFORD *Plaintiffs*	§ § §	IN THE DISTRICT COURT
	§ §	SHELBY COUNTY, TEXAS
ABLE SUPPLY COMPANY, ET AL *Defendants*	§ §	123rd JUDICIAL DISTRICT

ORDER DENYING FRICTION DEFENDANTS MOTION TO STRIKE THE TESTIMONY OF DR. RICHARD LEMEN AND DR. JAMES BRUCE

CAME ON, to be considered on this the 7th day of October, 2002 the Friction Defendants Motion To Strike the Testimony of Dr. Richard Lemen and Dr. James Bruce. After reviewing and considering The Friction Defendants' Motion, Plaintiffs' response and the deposition of Dr. Lemen taken on September 19,2002, the Court finds there is a reliable scientific basis for the opinions of Drs. Richard Lemen and James Bruce that exposure to dust emitted from asbestos-containing friction products can cause mesothelioma. Accordingly, the Court overrules the Friction Defendants' Motion to Strike.

Signed this the 9th day of October, 2002.

[signature]

JUDGE PRESIDING

FILED
MARSHA SINGLETARY
DISTRICT CLERK
02 OCT -9 PM 12:53
DISTRICT COURT
SHELBY COUNTY, TEXAS
BY______ DEPUTY

CAUSE NO. CC-02-00296-A

CAROL ANN GELMI, Individually and as Personal Representative of the Heirs and Estate of **ANGELO GELMI**, Deceased, and **ALICE RAMSEY** *Plaintiffs,*	§	IN THE COUNTY COURT
	§	AT LAW NO. 1
vs.	§	
BONDEX INTERNATIONAL, INC.; et al, *Defendants*	§	DALLAS COUNTY, TEXAS

ORDER DENYING DEFENDANTS' MOTIONS FOR DISMISSAL FOR FORUM NON CONVENIENS

CAME ON FOR CONSIDERATION AND HEARING, Defendant TH Agriculture & Nutrition and Defendant Union Carbide Corp.'s Motions to Dismiss the claims of Plaintiffs pursuant to Section 71.051 of the Texas Civil Practice and Remedies Code. After considering the pleadings and arguments of counsel, the Court has determined that the relief sought is not meritorious.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motions to Dismiss the claims of Plaintiffs are hereby DENIED in all respects.

SO ORDERED this 18th day of SEPTEMBER 2003.

JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED BY:

Dana Fox

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ATTORNEYS FOR PLAINTIFFS

[redacted]

FILED
at 9:58 o'clock A M.
8-12-03
JERRY DEERE
Clerk of District Court Brazoria Co., Texas
BY _____ DEPUTY

CAUSE NO. 15475-RM01

FLORENCE FINCH, et al.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	BRAZORIA COUNTY, TEXAS
ALCOA, INC., et al.	§	
Defendants	§	149TH JUDICIAL DISTRICT

ORDER DENYING DEFENDANT UNION CARBIDE'S MOTION TO DISMISS FOR FORUM NON CONVENIENS Union Carbide's

On the 12th day of August, 2003, came on to be heard Defendant's Motion to Dismiss for Forum Non Conveniens and the Court after considering Defendant's motion, the response, the pleadings, all evidence on file and the arguments of Counsel is of the opinion that said motion should be denied.

It is accordingly ORDERED, ADJUDGED and DECREED that the Defendant's Motion Union Carbide's to Dismiss for Forum Non Conveniens in hereby DENIED.

SIGNED this the _____ day of August, 2003.

JUDGE PRESIDING

APPROVED AND ENTRY REQUESTED:

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CAUSE NO. B-166,681

IVORY WILSON, ET AL	§	IN THE DISTRICT COURT OF
	§	
VS.	§	JEFFERSON COUNTY, TEXAS
	§	
ARCO CHEMICAL COMPANY, ET AL	§	60TH JUDICIAL DISTRICT

DEFENDANTS' MOTION TO STRIKE THE INTERVENTION OF PLAINTIFFS AND MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, CERTAINTEED CORPORATION, ("CertainTeed"), DANA CORORATION, ("Dana") and UNION CARBIDE CORPORATION *d/b/a* UNION CARBIDE CHEMICALS AND PLASTICS, INC., ("Union Carbide"), Defendants in the above-entitled and numbered cause, in accordance with Rule 60 of the TEXAS RULES OF CIVIL PROCEDURE, and file this, their Motion to Strike the Intervention of Plaintiffs and Motion to Dismiss, striking the Intervention of Plaintiffs Marie R. Senigal, Individually and as Personal Representative of the Heirs and Estate of Fred Senigal, John F. Winn, Verna Marie White, Individually and as Personal Representative of the Heirs and Estate of Cloys M. White, Sara McFadden, Individually and as Personal Representative of the Heirs and Estate of Johnny T. Beard, Arthur Bell, Sr., Geraldine M. Deckard, Individually and as Personal Representative of the Heirs and Estate of Everett Deckard, Howard Portwood, Sr. and Perry Hockless, Sr. and further dismissing the claims of Howard Portwood, Sr. and Perry Hockless, Sr. ("Intervenors"). In support of this motion, Defendants would show to the court the following:

[redacted]

claims of Ivory Wilson, will affect their interests. Plaintiffs/Intervenors fail to satisfy the requirements of Rule 40 of the TEXAS RULES OF CIVIL PROCEDURE.

26. Plaintiffs' Original, First, Fifth, Seventh and Eighth Amended Petitions fail to show that the Plaintiffs/Intervenors are asserting claims arising from the same transaction or occurrence as the original claims of Ivory Wilson. An intervening party must assert a claim arising from the same transaction or occurrence as the original claim. TEX.R.CIV.P. 40. Their respective alleged claims involve the same legal cause of action, but they are not *the* same transaction. A close look at Plaintiffs/Intervenors' claims reveals that they are not claims *arising from the same transaction or occurrence.* The Plaintiffs/Intervenors allege work at different places, most likely in different crafts using different materials varying from the original claims. Plaintiffs/Intervenors allege claims for their personal injuries alleged as a result of exposure to asbestos from *other* transactions or occurrences. Plaintiffs/Intervenors do not make any allegation that they have any interest in the alleged personal asbestos exposure claims of Plaintiff Ivory Wilson.

27. All asbestos claims are not the same. The mere assertion that a person is claiming injury as a result of exposure to asbestos does not qualify the claim to be joined to any other asbestos related personal injury or wrongful death action pending in a court in Jefferson County, Texas, just as the claim to have been injured in a car wreck does not entitle that person to intervene into any other car wreck case. Defendants assert that this is neither the intention nor the meaning of the laws governing intervention. *See Electronic Data Systems Corp. v. Pioneer Electronics*, 68 S.W.3d 254, (Tex.App.—Fort Worth, 2002).

District Clerk and grant Defendants such other and further relief to which Defendants may show itself justly entitled.

Respectfully submitted,

GERMER GERTZ, L.L.P.

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ATTORNEYS FOR
UNION CARBIDE
CORPORATION d/b/a UNION
CARBIDE CHEMICALS AND
PLASTICS INC.
CERTAINTEED CORPORATION
AND DANA CORPORATION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Defendants' Motion to Strike Plaintiffs' Intervention and Motion to Dismiss has been forwarded to Plaintiffs' counsel of record, Tim Herron, of Hissey, Kientz & Herron, 16800 Imperial Valley Drive, #130, Houston, Texas 77060, via certified mail return receipt requested no. 7003 1010 0005 0190 1448 and Herschel L. Hobson, of The Law Offices of Herschel L. Hobson, 2190 Harrison, Beaumont, Texas 77701, via certified mail return receipt requested no. 7003 1010 0005 0190 1455 and to all other known counsel of record via fax or U.S. Mail, on this the 12th day of August, 2003.

Paula H. Blazek

CAUSE NO. B-166,681

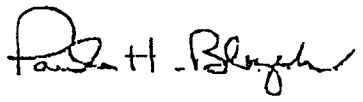
IVORY WILSON, ET AL	§	IN THE DISTRICT COURT OF
	§	
VS.	§	JEFFERSON COUNTY, TEXAS
	§	
ARCO CHEMICAL COMPANY, ET AL	§	60TH JUDICIAL DISTRICT

NOTICE OF HEARING

Please take notice that the MOTION TO STRIKE THE INTERVENTION OF PLAINTIFFS and MOTION TO DISMISS of Defendants CERTAINTEED CORPORATION, DANA CORPORATION and UNION CARBIDE CORPORATION D/B/A UNION CARBIDE CHEMICALS AND PLASTICS, INC. will be heard on Friday, August 29, 2003 at 9:00 a.m. in the 60TH Judicial District Court of Jefferson County, Texas.

Respectfully submitted,

GERMER GERTZ, L.L.P.



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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing notice of hearing has been furnished to Plaintiffs' counsel, Robert E. Kientz via certified mail, return receipt requested no. 7003 1010 0005 0190 1448 and Herschel L. Hobson, via certified mail, return receipt requested no. 7003 1010 0005 0190 1455 and to all other known counsel of record in this case via U.S. Mail on this 12th day of August, 2003.

CAUSE NO. 01-06238

JIM FRANKLIN, et al.,	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
v.	§	DALLAS COUNTY, TEXAS
	§	
ACandS, INC., et al.,	§	
	§	
Defendants.	§	95th JUDICIAL DISTRICT

DEFENDANT UNION CARBIDE CORPORATION'S OBJECTION TO THE JOINDER OF THE HALL PLAINTIFFS, MOTION TO SEVER OR, IN THE ALTERNATIVE, MOTION FOR SEPARATE TRIALS

For the following reasons, Defendant Union Carbide Corporation ("UCC") objects to the joinder of the Hall Plaintiffs, and moves to sever the causes of action asserted by the Hall Plaintiffs from the causes of action of the remaining Plaintiffs, the Franklin Plaintiffs. Alternatively, UCC moves for separate trials of the claims and the Hall Plaintiffs and the Franklin Plaintiffs.

I. Overview

The Franklin Plaintiffs initially filed this asbestos suit against numerous defendants on July 27, 2001, claiming that Vernon Franklin suffered injuries due to alleged asbestos exposure through the use of various manufacturers' products.[1] The Franklin Plaintiffs also sued UCC as a supplier rather than a manufacturer, claiming that UCC owned a mine from which raw asbestos was mined, milled and bulk-shipped to various manufacturers, who then incorporated the raw

[1] Plaintiffs' Original Petition and Jury Demand, dated July 27, 2001, is incorporated herein by reference and attached for the Court's convenience as Exhibit A.

material into finished products.[2] For almost two years, the parties to this suit have been conducting discovery and preparing for trial, which is currently set for September 8, 2003.[3] The Hall Plaintiffs, on the other hand, originally filed suit against numerous other defendants in a lawsuit also involving another plaintiff, Wayne Randall Peacock, in Dallas County, on October 31, 2000.[4] The Halls were subesquently dropped from the Peacock suit and now, on the eve of trial, have been added to the Franklin matter.[5] The Hall Plaintiffs are unrelated to the Franklin Plaintiffs and their complaints stem from distinctly different individual facts and circumstances.[6] This attempt to obtain a preferential setting for new, unrelated plaintiffs by joining them in a case that has been pending for two years just months from trial is improper, an abuse of the judicial process, and if permitted, will result in an unfair trial.

Moreover, the claims of the Franklins' and Halls' have different characteristics and underlying facts that will create too great a risk of confusion and prejudice if they proceed to trial together. The Franklins and Halls have named a total of 42 defendants, 23 of whom have been added as new defendants in the past three months. Additionally, Mr. Franklin is deceased, while the Halls are living. The Franklins and Halls are residents of different states and allege exposure at different work sites. Finally, the Franklins' claims have been pending for two years and will

---

2 *Id.*

3 UCC asks that the Court take judicial notice of the current trial setting in this case.

4 The Original Petition from the Dallas County suit involving the Hall and Peacock Plaintiffs, dated October 31, 2000, is incorporated herein by reference and a copy has been attached for the Court's convenience as Exhibit B.

5 The Halls were first added in Plaintiffs' Second Amended Petition and Jury Demand dated March 13, 2003, which is incorporated by reference herein and attached as Exhibit C.

6 *See Id.*

be ready for trial on September 8, 2003, while discovery into the Halls' claims has barely begun. If allowed to proceed to trial together, the Franklin and Hall Plaintiffs will rely on different witnesses and documents to support their separate theories of recovery, to which Defendants have asserted different theories and defenses. Consequently, permitting both groups of Plaintiffs to try their disparate causes of action together would deprive Defendants of an opportunity for a fair trial.[7]

II. Argument and Authorities

A. The late joinder of the Hall Plaintiffs is nothing more than forum shopping and an effort to manipulate an expedited trial setting.

The joinder of the Hall Plaintiffs just months before the Franklins' trial setting is a transparent effort to seize an expedited trial setting in the court of the Hall Plaintiffs' choosing. Such efforts to circumvent the rules of procedure, the Dallas County local rules and docket control mechanisms, as well as the controlling case management order, are an abuse of the judicial process and joinder mechanism.[8] As set forth more fully below, the claims of the Hall Plaintiffs have nothing to do with those of the Franklin Plaintiffs and there is absolutely no reason or explanation for their joinder in this proceeding other than sheer manipulation and abuse. This conduct should neither be permitted nor condoned.

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[7] *See In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998); *see generally Cain v. Armstrong World Indus.*, 785 F. Supp. 1448 (S.D. Ala. 1992).

[8] The Dallas County 2003 Amended Case Management Order ("Order"), incorporated herein by reference and attached for the Court's convenience as Exhibit D, dictates that this is just the kind of situation in which severance is appropriate. The Order states that all product identification witnesses are to be designated at least sixty days before trial. When such designations are not timely made as to one set of plaintiffs, but the other plaintiffs included in the same cause number are ready for trial, a severance will be appropriate. Such is the case here – trial is less than sixty days away, and while the Franklins have named product identification witnesses in their discovery responses and will be ready to proceed to trial in September, the Halls have not timely provided information pertaining to product identification witnesses.

B. Plaintiffs cannot compromise the Defendants' right to a fair trial, even to economy

Texas Rule of Civil Procedure 40(a) allows multiple plaintiffs to join in one action if their claims arise out of the same transaction or occurrence and if they raise common issues of law or fact. If plaintiffs violate this rule, however, the court should sever the improperly joined claims into separate actions under Rule 41. Moreover, Rule 40(b) empowers the court to make such orders "as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party . . . who asserts no claims against him" and to "order separate trials or make other orders to prevent delay or prejudice."[9] The Court must exercise its discretion to try cases together thoughtfully and carefully, within the limits created by the circumstances of each particular case.[10] When trying cases together, the court must take care to avoid prejudice to the defendants and *unfair advantage* to the plaintiffs.[11] It cannot compromise the parties' rights to a fair trial to achieve increased judicial economy.[12] The court must weigh the risk of prejudice or confusion against economy of scale, with considerations of convenience and economy yielding to the paramount concern for a fair and impartial trial.[13] A trial court has no discretion to deny a request for separate trials when the maintenance of one combined suit will result in injustice.[14]

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9 TEX. R. CIV. P. 40(b).

10 *See Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993); *Ethyl*, 975 S.W.2d at 610.

11 *Cantrell*, 999 F.2d at 1011.

12 *Ethyl*, 975 S.W.2d at 610.

13 *Id.* at 611-12 (quoting *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)).

14 *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998).

The court's main goal in ordering separate trials is to prevent prejudice to Defendants.[15]

The Texas Supreme Court has adopted a number of nonexclusive factors for evaluating whether trying different plaintiffs' asbestos cases together will confuse the jury and prejudice the defendants.[16] When making such a determination, a court should consider (1) common work sites; (2) similar occupations; (3) similar times of exposure; (4) types of diseases and types of cancers alleged; (5) the types of asbestos-containing products to which each plaintiff was exposed; (6) whether the plaintiffs are living or deceased; and (7) whether evidence admissible against one defendant is inadmissible against another.[17] Finally, two additional factors, while somewhat less relevant, are also important to the court's decision: the status of discovery in each case; and whether the plaintiffs are represented by the same counsel.[18]

C. The Court should sever the Halls Plaintiffs' claims from the Franklins Plaintiffs' claims to avoid confusing the Jury and prejudicing Defendants.

In addition to the fact that the Hall Plaintiffs have been improperly joined in an effort to take advantage of an expedited trial setting, severance is appropriate in this case because the Hall Plaintiffs have raised different factual issues and legal theories than the Franklin Plaintiffs, creating a significant risk of confusion and prejudice. Although UCC has received limited information regarding the Hall Plaintiffs, several distinct differences between the claims of the

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15 *See Id.*

16 *Id.*

17 *Id.* at 611, 616-17.

18 *Id.* at 616. The plaintiffs' differing stages of discovery are discussed at length in a later section of this motion. With regard to plaintiffs' claims being handled by the same counsel, while Waters & Kraus does represent both sets of Plaintiffs, the fact remains that the Franklins' claims have been pending for over two years, while the Halls' claims have been added just months before the scheduled trial date.

Hall Plaintiffs and Franklin Plaintiffs are evident from the pleadings and discovery responses and will clearly create a significant risk of confusion and prejudice should these claims proceed to trial together.

1. The Hall Plaintiffs and Franklin Plaintiffs are from different states and allege exposure at different work-sites.

Plaintiffs have never stated that Hall or Franklin ever worked together on even a single work site.[19] Indeed, this factor alone creates a need for separate trials in order to avoid overwhelming the jury with an unnecessary and confusing volume of evidence. The Texas Supreme Court acknowledges that the number or diversity of work sites, alone, is enough to create "such confusion that it would be an abuse of discretion to consolidate."[20] In this case, the Hall Plaintiffs and Franklin Plaintiffs are not residents of the same state. Through discovery responses and deposition testimony, Defendants have determined that Mr. Franklin lived in California – the state where his alleged exposure occurred.[21] The Halls, however, are residents of Georgia.[22] And, although UCC has received only limited discovery responses pertaining to the Halls,[23] these responses indicate that Mr. Hall is alleging exposure to asbestos-containing

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19 *See* Plaintiffs' Master Discovery Responses (with regard to Mr. Franklin) (hereafter "Franklin Discovery Responses"), which are incorporated by reference herein and attached as Exhibit E, at Plaintiffs' Exhibit 1 (Work History Sheets) (failing to identify any co-worker or supervisor named Hall).

20 *Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 614 (Tex.App.—El Paso 1992, no writ).

21 Mr. Franklin's deposition, taken August 23, 2001, is incorporated by reference herein and attached as Exhibit F, at 15:2-5.

22 *See* Exhibit A: Plaintiffs' Second Amended Petition, dated March 13, 2003.

23 Although UCC did finally receive discovery responses from Mr. Hall, the Work History Sheets included in those discovery responses were Mr. Peacock's work history sheets and not Mr. Hall's. UCC finally received Mr. Hall's Work History Sheets on July 24, 2003. Mr. Hall's Work History Sheets are incorporated herein

products at job sites in Georgia.[24]

In addition to the unnecessary increase in the volume of evidence, trying these claims together will require the jury to apply multiple states' laws to each set of Plaintiffs' claims. As noted above, the Franklin Plaintiffs allege that Mr. Franklin was exposed to asbestos-containing products while working in California, while the Hall Plaintiffs allege that Mr. Hall was exposed to asbestos-containing products on work sites in Georgia.[25] Consequently, under choice-of-law principles, a single jury would have to learn and apply California law to the Franklin Plaintiffs' claims and Georgia law to the Hall Plaintiffs' claims. These states have different rules regarding, among other things, standards of liability and available defenses.[26] This creates a great risk that the jury will fail to understand and apply the appropriate law to each set of Plaintiffs' claims, resulting in reversible error and possible prejudice to Defendants.

2. Plaintiffs allege dissimilar times of exposure.

The time of exposure to asbestos affects the Court's determination in two ways: (i) the length of exposure; and (i) the dates of exposure. Plaintiffs differ in their lengths of exposure: the Franklin Plaintiffs claim exposure to pipe covering, insulating cement and gaskets over a

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by reference and a copy is attached as Exhibit G.

[24] *See* Plaintiffs' Master Discovery Responses pp. (pertaining to Mr. Hall) (hereinafter "Hall Discovery Responses"), which are incorporated by reference herein and attached as Exhibit H, at p. 14; Exhibit G: Hall Work History Sheets.

[25] *See* Exhibit E: Franklin Discovery Responses; Exhibit F: Franklin Deposition, at 18:17 - 19:1; Exhibit H: Hall Discovery Responses, at p. 14.

[26] *See* CAL. CIV. CODE § 1431.2 (indicating that there is no joint and several liability under California law, but only several liability); *Amer. Ag. Chem. Corp. v. Jordan*, 173 S.E. 488, 496-97 (Ga. Ct. App. 1934) (allowing for joint and several liability under Georgia law);

twenty-one year period, and exposure to joint compounds over a three month period,[27] while the Hall Plaintiffs allege up to twenty-five years of exposure to all the products Mr. Hall has identified.[28] The difference in Plaintiffs' lengths of exposure directly affects their ability to demonstrate that the exposures caused their respective health problems.[29]

Plaintiffs also allege different dates of exposure to asbestos in joint compound: Franklin claims exposure to asbestos on dates between 1953 to 1974, with the only joint compound exposure occurring over a three month period in 1970,[30] while Hall's alleged dates of exposure are between 1950 and 1975.[31] The difference in dates is significant for two reasons. First, the dates of exposure affect the evidence necessary to trace a particular defendant's asbestos to products that a particular plaintiff actually used. UCC supplied raw material to (1) certain manufacturers, (2) in certain geographic regions, (3) at certain periods of time. For example, the Franklin Plaintiffs must demonstrate that UCC supplied asbestos to a particular manufacturer, who then incorporated that UCC asbestos into a product to which Franklin was exposed. If the cases are tried together, it will be much more difficult for the jury to sort out this information for each set of Plaintiffs, each manufacturer, and each supplier.

Second, the different dates of exposure will make different "state-of-the-art" evidence

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27 *See* Exhibit E: Franklin Discovery Responses, (Work History).

28 *See* Exhibit H: Hall Discovery Responses, at p. 11; Exhibit G: Hall Work History Sheets.

29 *See Ethyl*, 975 S.W.2d at 615-16.

30 *See* Exhibit E: Franklin Discovery Responses (Work History).

31 *See* Exhibit H: Hall Discovery Responses, p. 11; Exhibit G: Hall Work History Sheets.

relevant to each set of Plaintiffs' claims.[32] When asserting a state-of-the-art defense, a defendant's actions are evaluated in light of a given state of knowledge at a particular point in time.[33] Evidence regarding causation and liability varies greatly based on this knowledge and based on the length and dates of exposure.[34] In cases where, as here, plaintiffs allege different lengths and dates of exposure, severance avoids the substantial risk that a jury will apply evidence, whether causal or state-of-the-art, from a particular period of time to the wrong defendant.

3. The Plaintiffs allege exposure to different asbestos-containing products.

Additionally, each set of Plaintiffs alleges exposure to different types of asbestos-containing products. The Franklin Plaintiffs claim that Mr. Franklin was exposed to at least one brand of joint compound, four brands of pipe covering or block insulation, two brands of insulating cement and two brands of gaskets.[35] But, Plaintiffs' petition and discovery responses indicate that while the Hall Plaintiffs have asserted claims against some of these same defendants, they are also claiming exposure to products manufactured by twenty-seven other companies not named by the Franklins.[36] Specifically, the Hall Plaintiffs' allege that Mr. Hall

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32 *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 351 (2d Cir. 1993).

33 *See Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 717-18 (Tex. App.–Dallas 1997, no writ).

34 *Id.* at 718.

35 *See* Exhibit E: Franklin Discovery Responses, at Plaintiffs' Exhibit 1 (Work History Sheets); Exhibit E: Franklin Deposition, at 49:19-50:2; 52:3-21; 57:2-5.

36 See Exhibit I: Plaintiffs' Fourth Amended Petition, dated June 3, 2003. While both the Halls and the Franklins are alleging exposure to products manufactured by companies such as *Georgia-Pacific, Kelly-Moore* and *Proko*, the Halls are also alleging exposure to products manufactured by *Able Supply Co., Ametek Inc., General Electric, General Refractories, and Kellogg Brown & Root.* Moreover, in his discovery responses, Mr. Hall alleges

was exposed to seven brands of pipe covering and block insulation, one brand of asbestos gloves, one brand of block mix, one brand of mask, 4 brands of boilers, one brand of packing, three brands of refractory cement, one brand of asbestos blankets, three brands of joint compound, one brand of fireproofing, and two brands of insulating cement.[37] Moreover and significantly, the Hall Plaintiffs are not asserting a claim against UCC, while the Franklin Plaintiffs are. The differences in manufacturers the Plaintiffs are asserting claims against raises the possibility of juror confusion for several reasons.[38]

First, the differences in Plaintiffs' allegations have resulted in claims against 42 different defendants. The Franklin Plaintiffs currently seek recovery from 21 defendants based on the products that Vernon Franklin allegedly used, three of which do not overlap with the Hall Plaintiffs.[39] The Halls seek recovery from 23 Defendants, five of which do not overlap with the Franklin Plaintiffs.[40] More than half of the total number of defendants – 23 in fact – have been added to this suit within months of trial: 7 new defendants were added on March 13, 2003, and

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exposure to 26 products manufactured by *A.P. Green, A.C.& S., Armstrong, Fibreboard Corp., Guard-Line, Johns-Manville, Kaiser Aluminum & Chemical Corp., Minnesota Mining & Manufacturing Co., Pittsburgh Corning Corp., Babcox & Wheeler, Combustion Engineering, Foster Wheeler, GAF-Ruberoid, Garlock, North American Refractories, Owens-Corning Fiberglass Corp., Owens-Illinois, Rapid American Corp., Riley Stoker Corp., Uniroyal, U.S. Gypsum, and W.R. Grace & Co. – Conn.* Mr. Franklin did not use any of these 26 products and is not maintaining claims against these 22 additional manufacturers. *See* Exhibit H: Hall Discovery Responses at pp. 13-15; Exhibit G: Hall Work History Sheets.

37 *See* Exhibit H: Hall Discovery Responses, pp. 13 - 15; Exhibit G: Hall Work History Sheets.

38 *See* Exhibit H: Hall Discovery Responses, pp. 13-15.

39 *Id.*

40 *Id.*

16 were added on May 29, 2003.[41] Moreover, Plaintiffs' Petition does not make clear which plaintiffs are being sued by each of the last 16 defendants that were added on May 30, 2003.[42] Based on the fact that the Franklin Plaintiffs are alleging exposure to nine different products, while the Hall Plaintiffs are alleging exposure to 30 different products, 26 of which were not used by Mr. Franklin, these 16 defendants were likely added as a result of the improper joinder of the Hall Plaintiffs.[43]

This scenario creates a high risk of juror confusion with the jurors having immense difficulty keeping track of which Defendants engaged in actions relating to each set of Plaintiffs. This factor is an "important consideration" favoring severance, because, inevitably, the confusion will prejudice Defendants.[44] Not only will the jury in this case have to distinguish between the claims of two separate sets of plaintiffs who are alleging exposure to different products at different work sites, they will also have to determine which of the 31 total products were used by each plaintiff and which of the 42 defendants is responsible to each plaintiff. Such an inordinate

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41 *See* Exhibit C: Plaintiffs' Second Amended Petition, dated March 13, 2003 (naming as new defendants *Able Supply Co., Ametek Inc., General Elec., General Refractories, Kellogg Brown & Root, Philips Elec. North Amer., and T. H. Agriculture*). Plaintiffs' Third Amended Petition, dated May 29, 2003 in incorporated herein by reference and a copy attached as Exhibit J, (naming as new defendants *Alfa Laval Inc., Buffalo Pumps, Carver Pump Co., Crane Co., Ecodyne MRM Inc., Elliott Turbomachinery, General Motors, Gorman-Rupp Co., Goulds Pump, Inc., Goulds (IPG), Goulds (NY), Henry Vogt Machine Co., Howden Buffalo Inc., IMO Indus., Tyco Valves & Controls Inc.*, and *John Crane Inc.*).

42 *See* Exhibit J: Plaintiffs' Third Amended Petition, dated May 29, 2003 (adding as new defendants: *Alfa Laval Inc., Buffalo Pumps, Carver Pump Co., Crane Co., Ecodyne MRM Inc., Elliott Turbomachinery, General Motors, Gorman-Rupp Co., Goulds Pump, Inc., Goulds (IPG), Goulds (NY), Henry Vogt Machine Co., Howden Buffalo Inc., IMO Indus., Tyco Valves & Controls Inc.*, and *John Crane Inc.*).

43 *See* Exhibit J: Plaintiffs' Third Amended Petition, dated May 29, 2003. (Naming the 16 additional defendants); *see also* Exhibit E: Franklin Discovery Responses (Work History); Exhibit H: Hall Discovery Responses, pp. 13-15; Exhibit G: Hall Work History Sheets.

44 *See In re Ethyl Corp.*, 975 S.W.2d 606, 617 (Tex. 1998).

number of products and defendants is virtually unmanageable.

Moreover, while some of the products may appear similar, the distinctions between them will critically affect Plaintiffs' ability to prove their cases against their respective sets of Defendants. To hold UCC liable, for example, the Franklin Plaintiffs initially must prove that UCC supplied the raw material that was included in a particular manufacturer's product at the time that Mr. Franklin allegedly was exposed to that particular product.[45] The Hall Plaintiffs do not have the same burden because they have not made any claims against UCC. Therefore, not only will the jury have to distinguish between two sets of plaintiffs from two different states who are alleging exposure to different products, the jury will also have to apply different burdens to each plaintiff.

Finally, trying claims against all 42 Defendants together, despite their limited overlap, creates a considerable risk that the jury will not distinguish UCC, a supplier defendant, from the manufacturing defendants that the Franklin Plaintiffs and Hall Plaintiffs collectively have sued. As prior courts have noted, consolidation of so many parties in one case may cause the jury to "[throw] up its hands in the face of a torrent of evidence," indiscriminately finding misdeeds by all defendants based on sheer numbers.[46] The Court should avoid this prejudice to all Defendants at all costs, even if the result is a slight reduction in efficiency.

4. Evidence admissible against the Franklin Plaintiffs is inadmissible against the Hall Plaintiffs, and vice versa.

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[45] *See Nebgen v. Minnesota Mining & Mfg. Co.*, 898 S.W.2d 363, 366 (Tex. App.–San Antonio 1995, writ denied).

[46] *Dal-Briar Corp. v. Baskette*, 833 S.W.2d 612, 617 (Tex.App.—El Paso 1992, no writ); *see also Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993).

Another factor weighing in favor of severance is that the limited overlap in Plaintiffs' claims would allow the Franklin Plaintiffs to bring evidence before the jury at trial that is not admissible against their Defendants, as long as the evidence is admissible against the Hall Plaintiffs' Defendants (and vice versa). The Texas Supreme Court has stated that this is "an important consideration in determining if . . . separate trials are in order."

5. Mr. Franklin is deceased, while Mr. Hall is still living.

Another major difference between Plaintiffs' claims is that Franklin is deceased, while Hall is still living.[47] The Texas Supreme Court has noted that there is "considerable force" to the concern that dead plaintiffs may present the jury with a powerful, but possibly false, demonstration of the fate awaiting a living plaintiff.[48] This concern could result in an extremely high degree of prejudice not only to both liability and actual damages, but also as to any possible award of punitive damages.[49] The Court must take great care to avoid such prejudice to Defendants in this case.

6. Plaintiffs' selection of attorneys and discovery progress does not outweigh the risk of juror confusion and prejudice to Defendants.

It is true that the same law firm represents both sets of Plaintiffs, and that each set of parties has completed some discovery, albeit to differing degrees of completion. Nonetheless, the Texas Supreme Court has made it clear that sharing representation and common progress in discovery are "far less important" than the other *Ethyl* factors discussed above, and thus are

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47 *See* Exhibit I: Plaintiffs' Fourth Amended Petition, dated June 3, 2003 (indicating in the style of the case that Mr. Franklin is deceased).

48 *Ethyl*, 975 S.W.2d at 616 (quoting *Malcolm*, 995 F.2d at 351-52).

49 *See* Exhibit I: Plaintiffs' Fourth Amended Petition at ¶ 101.

entitled to little deference, if any.[50] These factors certainly do not outweigh the risks of prej[illegible] and confusion discussed above and, alone, cannot ensure that Defendants will receive a fair [illegible]

* * *

All of the above risks will make the findings, issues, and errors impossible to unravel, ultimately impeding and possibly denying the parties' right to appeal the jury's decision.[51] Jury instructions alone cannot always prevent the risk of confusion and error, no matter how intentl[illegible] and carefully those instructions are drafted and given.[52] Trying both sets of Plaintiffs' claims together creates a great risk of reversible error that significantly diminishes any potential benefit to judicial economy. The Court should therefore sever the Hall Plaintiffs' claims into a separate action.

D. Separate trials are necessary to prevent delay, expense and prejudice to UCC related to the inclusion of a party who asserts no claims against it.

The Hall Plaintiffs have alleged no claims against UCC. Thus, the Court should order a separate trial of the Hall Plaintiffs' claims in order to prevent any "embarrassment, delay or expense" to UCC.[53] Here, the Hall Plaintiffs have alleged claims against at least five defendants, and likely more, who did not make or supply any products or materials to which Vernon Franklin

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50 *Ethyl*, 975 S.W.2d at 616.

51 *Dal-Briar*, 833 S.W.2d at 617.

52 *See Malcolm*, 995 F.2d at 352; *Cain*, 785 F. Supp. at 1448 (court forced to grant new trial of each case due to jury confusion and prejudice caused by consolidation).

53 TEX. R. CIV. P. 40(b).

was allegedly exposed.[54] The Franklin Plaintiffs, in turn, have alleged claims against three [illegible] defendants whose products or materials Mr. Hall never used. While the defendants originally named by the Franklins have been conducting discovery and preparing for trial for more than two years, discovery into the Halls' claims has barely begun. Moreover, the additional defendants named by the Halls will have their own witnesses, experts and evidence at trial and will be certain to add additional time and expense to an already lengthy and expensive process. Clearly, UCC will suffer considerable delay, expense, and prejudice if it is forced to try the Hall Plaintiffs' claims at the same time as the Franklin Plaintiffs' claims. The Court should therefore sever the Hall Plaintiffs' claims into a separate action.

E. Alternatively, the Court should try the Hall Plaintiffs' claims separately from the Franklin Plaintiffs' claims.

In lieu of severance, the Court also may order separate trials of the Hall Plaintiffs' and the Franklin Plaintiffs' claims. Rule 40 permits the Court to issue orders to "prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party . . . who asserts no claim against him," including ordering separate trials of Plaintiffs' claims.[55] Alternatively, the Court may order separate trials of Plaintiffs' claims "in furtherance of convenience or to avoid prejudice."[56] As with severance, the Court's main goal in ordering separate trials is to prevent prejudice to Defendants.

Here, the Hall Plaintiffs are alleging exposure to 26 products that Mr. Franklin did not

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54 *See infra* footnote 35.

55 *See* TEX. R. CIV. P. 40(b).

56 TEX. R. CIV. P. 174(b).

use. The Franklin Plaintiffs, in turn, have alleged exposure to five products, to which Mr. Hall is not alleging exposure. For the reasons discussed in the preceding Section, the 42 Defendants will suffer considerable delay, expense, and prejudice if they are forced to try the Hall Plaintiffs' claims at the same time as the Franklin Plaintiffs' claims. Accordingly, UCC respectfully requests that the Court order separate trials of Plaintiffs' claims.

III. Conclusion

The Hall Plaintiffs have been joined at the eleventh hour in this proceeding in order to manipulate the docket control mechanisms in Dallas County, and cherry-pick the court in which the matter is tried. This conduct is abusive and should not be allowed. Instead, the Hall Plaintiffs' claims should be severed and given a trial setting in the normal course of proceedings. Moreover, the claims of the Hall Plaintiffs and Franklin Plaintiffs have little in common. Vernon Franklin and Richard Hall allegedly worked with different products at different work sites in different states over different periods of time. One man is alive, while the other is deceased. Unsurprisingly, these disparate facts will force each set of Plaintiffs and their corresponding set of Defendants to assert different theories and defenses.

An asbestos case with only one plaintiff can be quite confusing due to the presence of multiple defendants, multiple products, and multiple suppliers. Trying different plaintiffs' claims together only exacerbates this confusion and complication where, as here, the plaintiffs used different products at different times in different places. This, in turn, creates an unfair environment where it is almost impossible for a jury to accurately evaluate the validity of each plaintiff's claims.

Plaintiffs' claims clearly do not arise out of the "same transaction, occurrence, or series of transactions or occurrences," requiring separate trials to avoid confusion to the jury and undue prejudice to Defendants. For these reasons, UCC respectfully requests that the Court sever the Hall Plaintiffs' claims into a separate action from the Franklins Plaintiffs' claims. In the alternative, UCC moves for separate trials of the Hall Plaintiffs' and Franklin Plaintiffs' claims.

Respectfully submitted,
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ATTORNEYS FOR DEFENDANT
UNION CARBIDE CORPORATION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was served upon Plaintiffs' counsel of record by hand-delivery this 4th day of August, 2003, and that all other co-defendants have been notified of this filing.

Mandi M. Akens

FIAT

Defendant Union Carbide Corporation's *Objection to Joinder of Hall Plaintiffs, Motion to Sever or, In the Alternative, Motion for Separate Trials* has been set for hearing before the Court on the _____ day of _____, 2003, at _____.m.

JUDGE PRESIDING

Survey of Texas Asbestos Firms Caseload

Total Cases Filed (2000-2003): 3,770
Total Plaintiffs Involved: 14,432
Cases Resolved by seven firms: 3,855
Cases Filed by those Firms: 3,108
Total Case Current Pending from these firms: 2,167

Law Firm Name		Cases Filed 2000	Cases Filed 2001	Cases Filed 2002	Jan-July 2003	July 1 - Sept 1 2003	Pd Sept 1	2003 to Date	Pending Sept 1
Kaeske Law Firm	Cases Filed	17	17	13	17	0	1		
	Number of Plaintiffs	22	22	22	15	0	1		
	Cases Resolved	16	9	3				12	
	Cases Pending								34
	Claims Settled	1098	969	833				602	
	Average Months # cases filed since 9/1/03 to Disposition	20	14	13					
Williams Bailey	Cases Filed	252	147	79	84	2	0		
	Number of Plaintiffs	256	151	79	892	5	0		
	Cases Resolved	147	48	6			201		
	Cases Pending	105	99	73					277
	Claims Settled	3658	1382	250			5290		
	Average Months # cases filed since 9/1/03 to Disposition	22	19	20					
Bruegger & McCullough	Cases Filed	13	12	14	15				
	Number of Plaintiffs	75	85	113	84				
	Cases Resolved	11	9	4				24	
	Cases Pending								30
	Claims Settled	1621	1683	1319				4623	
	Average Months # cases filed since 9/1/03 to Disposition	23	16	17					

Texas Asbestos Firms Caseload

	Cases Filed		479	346	252	57	3		
	Number of Plaintiffs	1597	1893	673	542	71	3		
	Cases Resolved	423	322	678	262	97	78		
	Cases Pending								866
	Claims Settled	97041	56701	74025	28615	9221	6406		
	Average Months # cases filed since 9/1/03 to Disposition	51	53	44	26	24	28		
Silber Pearlman	Cases Filed	194	155	179	68	15	0	83	
	Number of Plaintiffs	1897	1148	1306	366	136	0	502	
	Cases Resolved	271	255	355	90	27	21	117	
	Cases Pending								526
	Claims Settled	52488	44011	57872	16939	7808	8225	32972	
	Average Months # cases filed since 9/1/03 to Disposition	38	41	38	33	38	32		
Waters & Kraus	Cases Filed	131	103	140	69	9	7	85	
	Number of Plaintiffs	411	222	195	69	9	9		
	Cases Resolved								
	Cases Pending								
	Claims Settled	1317	784	468					
	Average Months # cases filed since 9/1/03 to Disposition	6-9 mos	6-9 mos	6-9 mos					
Wellborn Houston et al.	Cases Filed	29	13	25	18				
Henderson, Texas	Number of Plaintiffs	87	36	33	23				
	Cases Resolved	23	13	23				13	
	Cases Pending								96
	Claims Settled	1616	2524	2630				1199	
	Average Months # cases filed since 9/1/03 to Disposition	24	24	24					

Survey of Texas Asbestos Firms Caseload

Lanier Law Firm	Cases Filed	21	57	16	17	6	1		
	Number of Plaintiffs	170	370	270	17				
	Cases Resolved								
	Cases Pending								
	Claims Settled								300
The Lanier Law Firm reports that its average months to disposition is 12 months for mesothelioma cases and 24 months for other asbestos cases.	Average Months # cases filed since 9/1/03 to Disposition								
Parker & Parks	Cases Filed	21	3	4	2	10	0		
	Number of Plaintiffs	466	11	20	24	34	0		
	Cases Resolved	1	7	12				7	
	Cases Pending								38
	Claims Settled	39	4416	9685				5600	
An estimate based on all cases filed by the firm, including those filed prior to 2000.	Average Months # cases filed since 9/1/03 to Disposition	48	48	48					

Harris County Asbestos Filings 1993-2003

Year	Cases Filed	Cases Disposed	Active
1993	140	135	5
1994	193	191	2
1995	343	343	
1996	320	315	5
1997	1511	1456	55
1998	316	289	27
1999	454	371	83
2000	482	324	158
2001	549	290	259
2002	420	203	217
2003	352	30	322
Total	**5,080**	**3,947**	**1,133**

This information was gathered from the Harris County District Clerk's office. "Active" was calculated simply by subtracting the cases disposed from the cases filed, so it serves as an approximation of cases pending to date.

The most recent Office of Court Administration report shows that in Harris County as of August 31, 2002, there were 6,167 "Injury or Damage Other than Motor Vehicle" cases pending, and 3,520 cases of that category filed. Thus, approximately ten percent of the non-auto accident, personal injury cases filed are asbestos cases.

Please note that at some point in the past Harris County began to require that cases be single-plaintiff only, which will inflate the number of cases, as asbestos cases typically group a few like plaintiffs together.